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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

OTHNIEL FINLEY,

Defendant and Appellant.

C087063

(Super. Ct. No. 17FE020857)

Defendant Othniel Finley appeals his convictions for bringing a controlled substance into the Sacramento County Main Jail and possession of a controlled substance. He contends: (1) the prosecutor committed misconduct in closing argument; (2) the trial court erred in admitting evidence of his parole status; (3) the imposition of fines and fees should be vacated pending a determination of his ability to pay; and (4) the abstract of judgment must be corrected to remove his misdemeanor conviction. We agree the trial court must strike the misdemeanor conviction from the abstract of judgment and there was prejudicial prosecutorial misconduct in closing argument as to count 1 (Pen.

Code, § 4573).¹ Accordingly, we reverse the conviction on count 1 and remand the matter for further proceedings.

I. BACKGROUND

On November 7, 2017, defendant was a wanted parolee at large. Parole agent Elliot Beard had previously supervised defendant on parole. Agent Beard and his partner, parole agent Anthony Quintana, were in the field when they saw defendant. Beard recognized defendant and they stopped him. The agents confirmed defendant was a parolee at large. They conducted a pat down search, found no weapons, and transported defendant to the main jail. At the entrance of the main jail is a sign indicating it is illegal to bring drugs into the jail. The first part of the booking process took between 8 to 10 minutes, then defendant was medically cleared. A deputy searched defendant. During the course of that search, the deputy had defendant remove his shoes and socks. When the deputy turned one of defendant's socks inside out, a small baggie containing 2.93 grams of methamphetamine fell out. Defendant turned and had a surprised look on his face.

A complaint deemed an information charged defendant with knowingly bringing a controlled substance into a jail (§ 4573), misdemeanor possession of methamphetamine (§ 11377, subd. (a)), and alleged defendant had a prior serious felony conviction (§§ 1192.7, subd. (c), 667, subds (b)-(i)). A jury found defendant guilty of both counts and, in bifurcated proceedings, the trial court found true the prior serious felony conviction. The trial court sentenced defendant to four years in state prison, consisting of the low term of two years, doubled due to his prior strike conviction (count 1), and one year in county jail (count 2), stayed under section 654. The trial court imposed an \$80

¹ Undesignated statutory references are to the Penal Code.

court operations assessment (§ 1465.8), a \$60 court facilities assessment (Gov. Code, § 70373), and a \$500 restitution fine (§ 1202.4).

II. DISCUSSION

A. Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct in closing argument by denigrating his character and misstating the law. He contends the prosecutor argued he had a propensity to commit crimes, and this rose to the level of misconduct as it was the “major theme” of the prosecution’s argument. He also contends the prosecutor misstated the burden of proof when she argued if defendant had known of the methamphetamine’s presence at one time but forgotten it, that still constituted knowledge sufficient to satisfy section 4573.

1. Background

In closing argument, the prosecutor argued that, prior to entering the jail, defendant told officers he did not have anything illegal on him, saw the sign warning that bringing drugs into the jail was illegal, and brought methamphetamine into the jail. She argued defendant had walked past the sign many times before, this “[w]asn’t his first rodeo. Wasn’t his first time at the jail.” Thus, she argued, defendant understood the drugs were prohibited in the jail. She relied on the video of the search at the jail which showed the baggie of methamphetamine falling out of defendant’s sock as he was searched at the jail. She discussed the elements of the offense, that defendant had to unlawfully possess the controlled substance in jail, the quantity of the methamphetamine, the various steps along the way, and signs that would trigger his memory, and argued that forgetting something is not the same as not knowing it. “Forgotten knowledge is still knowledge.” She argued defendant’s knowledge of the presence of the methamphetamine could be shown by circumstantial evidence. She argued methamphetamine is a commodity in the jail and, because of his previous experience in jail, defendant knew that, so it was reasonable to think he would not want to disclose it.

Or, he thought the officers would not find it. All of these arguments were made without objection.

Defense counsel's closing argument relied on a claim that defendant "may have forgotten" about the methamphetamine in his sock. Defense counsel argued the circumstantial evidence—including defendant's answer that he did not have anything illegal on him when he was searched, he was not under the influence of a stimulant at the time of his arrest so had not recently used it, did not possess any other drug paraphernalia, and appeared surprised when the methamphetamine was discovered in his sock—supported the reasonable possibility that defendant had forgotten. Defense counsel also argued defendant's past experience having been searched in the booking procedure indicated he knew his sock would be searched and officers would find the methamphetamine.

In rebuttal, the prosecutor argued defendant did not have to intend to possess the drugs in jail. Defense counsel objected to this statement as misstating the law. The court overruled the objection. The prosecutor then reiterated the elements of the offense and stated there was no requirement that defendant had to specifically intend to bring the methamphetamine into the jail and told the jury to refer back to the instructions, and not what the attorneys argued. She argued it was not reasonable someone would forget they had "a lump of methamphetamine in their sock," particularly after being asked about contraband, and presented with a sign indicating it was illegal to bring drugs into the prison. She continued—countering defense counsel's arguments that a person would not walk past the sign knowing he was going to be searched, knowing he had methamphetamine in his sock and therefore defendant must have forgotten—by stating, "That presupposes and presumes that we're talking about somebody who makes good decisions. This isn't somebody who makes good decisions. We're talking about somebody who is a parolee at large and wasn't checking in." Defense counsel objected as "Impermissible argument. Predisposition." The trial court overruled this objection.

The prosecutor then continued, “We’re talking about somebody who isn’t making decisions that are good. We know he’s been to the jail before, been past the sign before. He knows that meth is a commodity. He’s probably not thinking in terms of what is the best decision to be made here. He’s thinking in terms of maybe they won’t catch it. Maybe they won’t find the meth. Hey, I can use this in the jail. [¶] Even past all of that, even if you put all of that aside, even if he forgot that meth was in his sock, it’s still not a defense because it doesn’t negate his knowledge that the meth was there.” Defense counsel objected to this as misstating the law. The trial court again overruled the objection. The prosecutor continued with this argument, arguing that a child forgetting to do chores was not a defense to not doing them, forgetting to file taxes was not a defense or an excuse for not filing them, and forgetting an anniversary was not a defense, because the knowledge is still there. She then told the jury to look at the elements of the offense and that they required defendant “knew of the substance’s presence, knew. Not knew and remembered it was there.”

After the jury began deliberations, the parties had further discussion about the prosecution’s argument regarding forgetting not being a defense to the knowledge element. Based on those discussions, the trial court called the jury back into the courtroom and gave a special instruction to eliminate any confusion that might have been caused by the arguments. The trial court instructed the jury, “If you believe the evidence presented that suggest [*sic*] the defendant did not know or forgot of [*sic*] the presence of the controlled substance on his person, that state of mind could indicate the defendant at that point did not know of the substance’s presence.”

2. *Analysis*

a. *Forfeiture*

The People contend defendant’s claim of prosecutorial misconduct is forfeited because defendant “did not make any objections on that basis specifically.” It is true, “[a] defendant may not complain on appeal of prosecutorial misconduct unless in a

timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.” (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) “ ‘[T]he absence of a request for a curative admonition does not forfeit the issue for appeal if “the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.” ’ ” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328-1329.) “ ‘The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.’ ” (*Id.* at p. 1328.)

Defendant timely objected to only one of the comments about his prior criminal history. That objection preserved the claim as to that comment but did not preserve the claims as to the other comments. Accordingly, only one of defendant’s claims of prosecutorial misconduct as to his prior criminal history is preserved, the others have been forfeited. (*People v. Powell* (2018) 6 Cal.5th 136, 171.)

Defendant also timely objected during rebuttal argument that the prosecution was misstating the law when arguing that if defendant had forgotten he had possession of methamphetamine that did not negate his knowledge, an element of the offense. A claim that the prosecutor is misstating the law, particularly as to an element of the offense, is a claim of prosecutorial misconduct. (See *People v. Hill* (1998) 17 Cal.4th 800, 829-830.)

These objections gave the trial court sufficient notice of the basis of the objection and the opportunity to correct the problem and cure any resulting harm. The trial court immediately overruled both objections, so the lack of a request for a curative admonition is also excused. Accordingly, we conclude this claim is preserved for appeal.

b. Relevant Law

The prosecutor has wide latitude to make vigorous arguments, as long as those arguments amount to fair comment on the evidence, including reasonable inferences or

deductions to be drawn from the evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) “ ‘ “A prosecutor may ‘vigorously argue his case and is not limited to “Chesterfieldian politeness” ’[citation], and he may ‘use appropriate epithets’ ” ’ ” (*Ibid.*) The prosecutor may be vigorous in argument and argue in colorful terms. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948, disapproved on another point *People v. Williams* (2010) 49 Cal.4th 405, 459 [prosecutor referred to defense witness as a weasel, another as a perjurer and that defendant had been caught in some “doozies” of lies].)

“It is misconduct for a prosecutor to misstate the law during argument. [Citation.] This is particularly so when the misstatement attempts ‘to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.’ ” (*People v. Otero* (2012) 210 Cal.App.4th 865, 870-871.) “[A]rguments of counsel ‘generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.’ ” (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.) “When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for ‘[w]e presume that jurors treat the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.’ ” (*People v. Osband* (1996) 13 Cal.4th 622, 717.) However, when, as here, the trial court’s instructions do not contradict the prosecutor’s statement of the law, there is no reason for the jury to reject or disregard the prosecutor’s argument. (See *People v. Centeno* (2014) 60 Cal.4th 659, 676.)

“A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the

use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)” (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

c. Denigrating Defendant

As to the prosecutor’s comment that defendant, as a parolee at large who was not checking in, was a person who was not making good choices, this argument fell within the prosecutor’s latitude to make vigorous argument. The prosecutor was not arguing defendant as a criminal was predisposed to commit crimes. Rather, the prosecutor was attempting to rebut defense counsel’s argument that a reasonable person would not choose to enter the jail, knowing he was subject to search, and seeing the sign indicating it was illegal to bring drugs into jail, with drugs in his sock. There is no reasonable likelihood the jury would have understood the prosecutor’s comments as indicating defendant had a predisposition to commit crimes. Defendant’s status as a parolee at large and the fact that he was not checking in with his parole officer was admitted into evidence without objection. It was fair comment on this evidence to argue defendant had a history of making bad choices, and one could infer from that he again made a bad choice walking past the signs prohibiting contraband in jail and thinking he would be able to get the drugs into the jail. The comments were based on “the evidence and amounted to no more than vigorous but fair argument.” (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.) Accordingly, we conclude there was no misconduct.

d. Misstating Law

The prosecutor, however, misstated the law relative to the element of knowledge. Contrary to the People’s argument, we do not believe the law is “not entirely clear” as to the knowledge requirement for this offense. As pertinent here, section 4573 “makes it a

felony for ‘any person’ to ‘knowingly bring[] . . . into . . . any state prison . . . or into any county . . . jail . . . any controlled substance’ without legal authority or official permission to do so.” (*People v. Low* (2010) 49 Cal.4th 372, 375.) Section 4573 prohibits all persons, from “walking into a custodial setting with knowledge they are bringing controlled substances with them.” (*Low, supra*, at p. 376.) “[T]he act that must be ‘knowingly’ performed to violate the ‘bring[ing]’ provisions of section 4573 involves entering a prison or jail in the possession of a controlled substance. In general, the knowing possession of a controlled substance simply requires an awareness of both its physical presence and narcotic character.” (*Id.* at p. 386.) Thus, section 4573 on its face, and as interpreted by our Supreme Court, requires that knowingly bringing a controlled substance into jail requires awareness of the physical presence of the narcotic when bringing it in to jail. If defendant genuinely forgot he had the methamphetamine with him, that negated the knowledge element, an element the People were required to prove beyond a reasonable doubt. Accordingly, the trial court improperly overruled defendant’s objection to the prosecutor’s argument on rebuttal that “forgotten knowledge” was not a defense.

This argument undermined defendant’s main defense that he did not knowingly bring the methamphetamine into the jail, as he had forgotten he had it. While the prosecutor also challenged the credibility of this defense, she repeatedly mischaracterized the law regarding knowledge. This improper argument undermined defendant’s primary defense, and thereby contributed to overall unfairness of the trial. (See *People v. Hill, supra*, 17 Cal.4th at p. 831.)

The trial court then compounded the error when it gave a special instruction that emphasized the issue of “forgotten knowledge” and misstated the law stating, if defendant had forgotten he had possession of the methamphetamine, that state of mind *could* indicate he did not know of its presence. This was a misstatement of the law. If the evidence demonstrated defendant had forgotten he had possession of the

methamphetamine, that state of mind would *necessarily* indicate he did not know the substance was present and, therefore, did not have the requisite mental state. An instruction intended to be curative was, at best, inadequate and did nothing to disabuse the jury of the incorrect impression left by the prosecutor's misstatements of law in rebuttal argument. In so doing, the trial court effectively ratified the prosecutor's error. (See *People v. Morales, supra*, 25 Cal.4th at p. 43; see also *U.S. v. Perlaza* (9th Cir. 2006) 439 F.3d 1149, 1171.)

Under these circumstances, there was very little reason for the jury to reject the prosecutor's misstatements of the law relative to an element of the offense. Because the trial court overruled defendant's timely objections, there was no admonition to the jury to cure the misstatements. The arguments directly undercut defendant's main defense to an element of the offense. The arguments were made in rebuttal and defense counsel had no opportunity to counter or correct the misstatements. The last word the jury heard on the subject was the trial court's special instruction, which incorrectly left the jury with the impression that defendant *could* be found guilty, even if he had forgotten he had the methamphetamine. On this record, there is a reasonable likelihood the misstatement of law caused the jury to convict based on this incorrect legal standard, which impermissibly lowered the prosecution's burden of proof. Accordingly, we must reverse the conviction on count 1. (See *People v. Centeno* (2014) 60 Cal.4th 659, 676-677.)

B. Admission of Evidence of Defendant's Criminal History

Defendant contends the trial court erred in admitting testimony of the parole agents as to his criminal history. Specifically, he complains of the admission of the testimony that he was a parolee at large and "on the run," and that parolees are commonly found with methamphetamine. He claims his objection to the prosecutor's rebuttal closing argument sufficiently preserved this evidentiary claim. Defendant offers no authority for this position and it is contrary to the law.

To preserve an evidentiary claim for appellate review, defense counsel must make a timely and specific objection to the evidence. (Evid. Code, § 353, subd. (a).) A timely objection to evidence is one made at the time the evidence is introduced. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) Because defendant did not timely object to the admission of evidence regarding his criminal history, the claim is forfeited.

C. Ability to Pay Fines and Fees

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant argues the fines and fees imposed must be vacated, as he does not have the ability to pay. We are not persuaded that the analysis used in *Dueñas* is correct.

Our Supreme Court is now poised to resolve this question, having granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47 (*Kopp*), review granted November 13, 2019, S257844, which agreed with the court's conclusion in *Dueñas* that due process requires the trial court to conduct an ability to pay hearing and ascertain a defendant's ability to pay before it imposes court facilities and court operations assessments under section 1465.8 and Government Code section 70373, but not restitution fines under section 1202.4. (*Kopp, supra*, at pp. 95-96.)

In the meantime, we join those authorities that have concluded the principles of due process do not require determination of a defendant's present ability to pay before imposing the fines and assessments at issue in *Dueñas* and in this proceeding. (*People v. Kingston* (2019) 41 Cal.App.5th 272, 279; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 928.) Having done so, we reject defendant's *Dueñas* challenge to the above-referenced fines, fees, and assessments.

D. Abstract of Judgement

Defendant contends, and the People properly concede, that the abstract of judgment improperly reflects his misdemeanor conviction for possession of a controlled substance and incorrectly describes it as a felony. (Health & Saf. Code, § 11377, subd.

(a.) We agree. Accordingly, we direct the trial court to correct the abstract of judgment to reflect the oral pronouncement of judgment.

III. DISPOSITION

The conviction on count 1 is reversed and the matter is remanded for further proceedings consistent with this opinion. The Clerk/Administrator of this court shall forward a copy of this opinion to the State Bar of California and notify the prosecutor in the trial court proceedings, as required by statute. (See Bus. & Prof. Code, § 6086.7, subds. (a)(2) & (b).)

/S/

RENNER, J.

I CONCUR:

/S/

HULL, ACTING P. J.

MAURO, J., Concurring and Dissenting.

I fully concur in the majority opinion except for part II. C. of the Discussion, pertaining to the restitution fine and assessments. As to that portion of the opinion, I dissent in part, and concur in part for a different reason.

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157, the court held it is improper to impose certain fines or assessments without determining defendant's ability to pay. (*Id.* at pp. 1168, 1172.) Although some courts have subsequently criticized *Dueñas*'s legal analysis (see, e.g., *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted Nov. 26, 2019, S258946), *Dueñas* remains citable precedent. Until the California Supreme Court has had an opportunity to resolve the current split in authority, I would remand the matter to give the trial court an opportunity to consider defendant's ability to pay the imposed assessments. But as for the restitution fine imposed by the trial court, I would conclude defendant forfeited the challenge to that fine because it was imposed above the minimum and defendant had an opportunity to object to it in the trial court but did not.

/S/

MAURO, J.